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In the Supreme Court of the United States

October Term, 1989

ROBERT A. BUTTERWORTH, and T. EDWARD AUSTIN,
Petitioners,
v.
MICHAEL SMITH,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR AMICI CURIAE AMERICAN CIVIL LIBERTIES UNION AND ACLU OF FLORIDA IN SUPPORT OF RESPONDENT

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INTEREST OF AMICI CURIAE[1]

The American Civil Liberties Union is a nationwide, nonpartisan organization of over 275,000 members dedicated to the preservation and advancement of fundamental constitutional rights. The ACLU of Florida is the Florida affiliate of the ACLU. It has a specific interest in this case, which arose within its jurisdiction.

The ACLU and its affiliates are committed to the protection of First Amendment rights of free speech and free press, having made the preservation of these rights a focus of their activities, in a number of forums, since

[1]Pursuant to Rule 36.2 of the Rules of this Court, the parties' letters of consent to participation of amici have been filed with the Clerk of Court; additional copies of those letters accompany this brief.

1920. This case, therefore, involves a matter of direct organizational interest to the ACLU.

SUMMARY OF ARGUMENT

The Florida statute challenged in this case is substantially overbroad because it is a total and permanent ban upon any speech or writing about the "content, gist, or import" of any testimony by any grand jury witness. The statute's extremely limited exceptions provide no protection for the substantial free speech rights of witnesses or for the rights of a free press.

The appropriate standard for testing this blanket ban upon free speech is articulated in Landmark Communications, Inc. v. Virginia, 435 U.S. 829 (1978), and other strict scrutiny cases. The test developed in

Seattle Times Co. v. Rhinehart, 467 U.S. 20 (1984), and similar cases, applies only in the context of specific judicial orders in particular cases.

Here, the statute does not pursue the State's asserted interests by the least restrictive means. This is shown by considering the facts of this case, other likely applications of the Florida statute, and the contrasting practice and experiences of most other states and of the federal system.

ARGUMENT

I. FLORIDA'S PERMANENT BAN UPON SPEECH AND WRITING INFRINGES UPON THE SUBSTANTIAL FIRST AMENDMENT RIGHTS OF GRAND JURY WITNESSES AND THE PRESS.

Florida's statute prohibits a "witness examined before the grand jury," from disclosing his or her "testimony" or "other evidence," except when specifically required by a court

for subsequent judicial proceedings or required by the witness' attorney. Fla. Stat. § 905.27(1)-(3) (1987).[2] Indeed, it constitutes a misdemeanor of the first degree and criminal contempt for the witness or "any person" to discuss or write in any manner about "the content, gist or import" of such testimony, unless and until it has been disclosed in open court. Id. at § 905.27(2), (4)-(5).

The Eleventh Circuit correctly concluded that such a complete and perpetual restriction upon freedom of

[2]A plain reading of the statute reveals that the prohibition is not based on the "time, place, or manner" of the speech. Ward v. Rock Against Racism, 109 S.Ct. 2746, 2753 (1989). See Board of Trustees of State Univ. of N.Y. v. Fox, 109 S.Ct. 3028, 3033 (1989). Accord Frisby v. Schultz, 108 S.Ct. 2495 (1988). Rather, it is a total ban on the content of truthful speech, which cannot be revealed at any time, in any place, or in any manner.

speech and press is not needed to achieve either the general or the specific goals asserted by the State. See part III, below. That Court employed the statute's savings clause to sever the phrase "any other person" from § 905.27(1), thereby excising only the unconstitutional aspect of the statute. See Smith v. Butterworth, 866 F.2d 1318, 1321 (11th Cir. 1989). This carefully delimited ruling vindicated the First Amendment rights of witnesses without jeopardizing any legitimate need for grand jury secrecy. The Eleventh Circuit left in place the statutory secrecy requirement for grand jurors, state attorneys, and support personnel.

By removing only the statute's blanket ban upon witness speech, the Eleventh Circuit also allowed a small ray of public scrutiny to shine upon an

unnecessarily shrouded public institution -- the grand jury. Prior to the Court's order, the statute prohibited anyone to draw upon his or her own experience as a witness to prepare a treatise or manual describing general grand jury procedures, to counsel his or her other clients on the rigors of testimony in a different case, or to pen an editorial criticizing a prosecutor's misuse of grand jury proceedings.

Moreover, this overbroad statute operates to restrict forever witnesses' First Amendment rights to free speech and rights of the free press, regardless of the need in any particular case for perpetual secrecy. Witnesses are prohibited from revealing their own testimony years after a grand jury's investigation has been concluded. The

only exceptions in the statute place the burden upon the citizen/witness, who must seek judicial permission to speak and can do so only under very limited circumstances. This approach, lauded by Petitioners and their Amici, actually reverses the established constitutional pattern, which rightly places the burden upon the government censor to justify any suppression of speech.

In defense of the statute, Petitioners and their Amici assert that its broad language only bans speech regarding matters the witness learns about for the first time during his or her participation in the confidential grand jury proceedings. See Brief for Petitioners at 20 n.8; Brief of Florida Prosecuting Attorneys Ass'n at 10-11; Brief of State of Arizona at 5. The statutory language cannot be so easily

limited. In this very case, for example, the statute has prevented a reporter from disseminating what he himself uncovered regarding alleged local political corruption, long before he was subpoenaed and required to testify before the grand jury. Nonetheless, Smith was silenced forever as to the "content, gist or import" of his wide-ranging testimony regarding his own research after the grand jury returned a no true bill. Because of the statute, he can never discuss that information, much less publish it.

Section 905.27 could have an even more egregious effect upon freedom of speech and press. It would enable a state attorney to squelch an ongoing press investigation of his political allies simply by subpoenaing the reporters involved and grilling them on

all aspects of their research. Thus, a reporter could be forced to tell the grand jury everything he has learned in months or years of research. Then, if the grand jury failed to indict, the reporter/witness would be silenced forever regarding the material developed in his own investigations. Nor could he ever share any of the material covered in his testimony with other members of his news organization. See Fla. Stat. § 905.27(2). Unless members of the news media were willing to risk criminal sanctions, the press would be rendered a toothless watchdog of the public interest.

II. THIS STATUTORY BAN IS SUBJECT TO THE MOST EXACTING SCRUTINY BECAUSE IT IS AN OVERBROAD RESTRICTION UPON THE CONTENT OF SPEECH.

A. Strict Scrutiny is the Correct Standard for Evaluating This Blanket Ban.

To justify a content-based ban on political speech, a state must show both that the "regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end." Boos v. Barry, 108 S.Ct. 1157, 1164 (1988); Landmark Communications, Inc. v. Virginia, 435 U.S. 829 (1978).

As explained in part I, Florida's permanent muzzle prohibits disclosure of the "gist or import" of a witness' grand jury testimony forever, except as required by the judicial system. Fla. Stat. § 905.27(1), (2) (1987). Indeed, Petitioners object to Mr. Smith's truthful speech precisely because they

fear its content. See Boos, 108 S.Ct. at 1164. Hence, they have subjected his (and others') speech to a total and permanent ban.

The Eleventh Circuit correctly concluded that the proper standard for testing such a blanket prohibition of truthful speech is articulated in Landmark Communications and Smith v. Daily Mail, 443 U.S. 97 (1979). See also Minneapolis Star v. Minnesota, 460 U.S. 575, 587 n.7 (1983). In fact, § 905.27(2) is remarkably similar to the statute invalidated in Landmark Communications, as both made it a crime to communicate information regarding a public investigative body, no matter how

that information was obtained.[3]

Strict scrutiny is especially appropriate in this case because the statute outlaws and chills "core speech" lying at the very heart of the First Amendment.[4] Hence, "'the substantive evil must be extremely serious and the degree of imminence extremely high before utterances can be punished'." Landmark Communications, 435 U.S. at 845, quoting Bridges v. California, 314 U.S. at 263. See also Wood v. Georgia, 370 U.S. 375, 384, 392-93 (1962); Pennekamp v. Florida, 328 U.S. 331, 347 (1946) (requiring a "solidity of evidence" to establish imminent danger).

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[3]All courts that have considered the issue have rightly concluded that the rationales of Landmark Communications and similar precedents prohibit criminal punishment of persons who file a complaint with an investigative body and then speak about their complaint during the confidential investigation. See First Amendment Coalition v. Judicial Inquiry & Review Bd., 784 F.2d 467, 477-79, 481 (3d Cir. 1986) (en banc); Doe v. Gonzalez, 723 F.Supp. 690, 1988 WL 167407 (S.D. Fla. 1988), aff'd, 886 F.2d 1323 (11th Cir. 1989); Providence Journal Co. v. Newton, 723 F.Supp. 846, 1989 WL 125992 (D.R.I. 1989). See also Bridges v. California, 314 U.S. 252 (1941) (speech by party during pendency of lawsuit). It is noteworthy that these cases invalidated even a temporary ban on the speech of voluntary participants during an ongoing investigation. The instant case involves the more extreme situation of a witness who was compelled by subpoena to testify to the investigative body and then was silenced after the investigation ended.

[4]Petitioners have rightly abandoned their mischaracterization of Smith's proposed writings as "commercial" speech, see Pet. for Cert. at 8, but one Amicus seems to persist in this error. See Brief of State of Arizona at 6. In fact, Smith did not "propose a commercial transaction," Board of Trustees of State Univ. of N.Y. v. Fox, 109 S.Ct. 3028, 3031 (1989). Instead, he sought to engage in political speech by writing about his testimony and about the grand jury. See also Posadas de Puerto Rico Assocs. v. Tourism Co. of Puerto Rico, 478 U.S. 328 (1986); New York Times Co. v. Sullivan, 376 U.S. 254, 265-66 (1964).

B. Seattle Times and Similar Cases are Inapposite, as They Involved More Delimited Restrictions in a Specialized Context.

This case raises no issue of press access to confidential proceedings or press exposure of secret government information. Rather, it concerns a permanent, blanket ban upon the speech of all grand jury witnesses. Therefore, Petitioners are simply incorrect to urge this Court to apply here the standard developed in Seattle Times Co. v. Rhinehart, 467 U.S. 20 (1984). Seattle Times addressed the constitutional constraints upon specific, limited protective orders tailored by a court to prevent abuse of its discovery processes in particular cases. That standard is clearly inappropriate for the evaluation of a blanket ban that patently silences and chills protected speech.

Furthermore, the source and flow of the information are radically different. In Seattle Times, a litigant in a civil suit was prevented from disseminating private organization membership data, developed by others, which the litigant had obtained only through a pretrial discovery order "that both granted him access to [the] information and placed restraints on the way in which the information might be used." 467 U.S. at 32.[5]

In the instant case, by contrast, the statute forbids a witness ever to discuss or use information that he himself developed and possessed before he was required to divulge it to the

[5]The protective order upheld in Seattle Times had "no application except to information gained by the defendants through the use of the discovery processes." 467 U.S. at 27 n.8 (quoting order).

grand jury. The witness is silenced without any particularized examination of potential detrimental effects. The concern, therefore, is not a newspaper's possible abuse of judicial orders. Rather, the dangers created by Florida's statute involve blanket government silencing of witnesses and monopolization of information developed by private citizens.

Petitioners' citation of Douglas Oil Co. v. Petrol Stops Northwest, 441 U.S. 211 (1979), is also misguided. There, plaintiffs in a civil antitrust suit sought the transcript of grand jury proceedings that had led to the criminal antitrust indictments of the defendants. In the instant case, Smith does not seek to obtain the testimony of any other witnesses; nor does he seek a transcript of the proceedings. Indeed, he does not

seek any information at all from the grand jury, because he already has the information. Smith simply wants to disseminate his own research about local political corruption, and relate an account of his personal experiences, without being subjected to criminal prosecution. See In re Sealed Motion, 880 F.2d 1367, 1370 n.6 (D.C. Cir. 1989).

Similarly, in citing United States v. Procter & Gamble Co., 356 U.S. 677 (1958), and Minton v. State, 113 So.2d 361 (Fla. 1959), petitioners miss the mark. In those cases, criminal defendants made an inadequate showing in their attempts to obtain transcripts of the grand jury testimony of other

witnesses.[6] Again, Smith neither seeks transcripts nor wishes to reveal aspects of an ongoing criminal proceeding; rather, he wishes only to remove the permanent gag placed in his mouth the moment the state attorney called him into the grand jury room.

III. FLORIDA DOES NOT HAVE A COMPELLING INTEREST IN PERMANENTLY SILENCING ALL GRAND JURY WITNESSES, AND IT HAS NOT PURSUED ITS ASSERTED INTERESTS BY THE LEAST RESTRICTIVE MEANS.

A. This Statute Cannot be Justified by Appeals to Ancient or Modern History.

In an attempt to justify their restrictive statute, Petitioners and their Amici repeatedly invoke the

[6]This Court, in Procter & Gamble, noted that the defendant had another method of obtaining the grand jury testimony of the state's witness -- pretrial discovery. Here, no means are permitted for Smith to regain control over his information; the State has silenced him completely as to the "gist" of his testimony by the threat of criminal prosecution.

ancient history of "grand jury secrecy," but they fail to analyze that history in any detail. In fact, the scholarly studies of the grand jury's history reveal that it has not been a single, static institution. Instead, the grand jury has been an evolving institution whose operation and procedures have adapted over time to its changing functions. See generally S. BEALE & W. BRYSON, GRAND JURY LAW AND PRACTICE §§ 1:02-1:09 (1986); CLARK, THE GRAND JURY 11-18 (1975); L. LEVY, ORIGINS OF THE FIFTH AMENDMENT, ch. 1 (1968); R. YOUNGER, THE PEOPLE'S PANEL: THE GRAND JURY IN THE UNITED STATES, 1634-1941 (1963).

Though the roots of the English grand jury system run to the mid-Twelfth Century, or earlier, the practice of hearing witnesses and deliberating in

private was not treated as an established custom until approximately the Seventeenth Century. See Groot, The Jury of Presentment Before 1215, 26 Am. J. of Legal Hist. 1, 3 (1982); Schwartz, Demythologizing the Historic Role of the Grand Jury, 10 Am. Crim. L.Rev. 701, 717 (1972).

When placed within historical context -- the prosecutions of Colledge and Shaftesbury -- it becomes clear that "the common law concept of grand jury secrecy developed from a need to protect the jurors and the accused from the tyranny of the Crown. Secrecy insulated the jurors from the pressures of" the government to indict. In re Russo, 53 F.R.D. 564, 568 (C.D. Cal. 1971). See also FRANKEL & NAFTALIS, THE GRAND JURY 9-10 (1977); Schwartz, supra, at 710-12. Secrecy served much the same purpose

during the Colonial and Revolutionary periods in our country. See Clark, supra, at 16-17.[7]

"Over the years, as fear of the oppressive power of the government has subsided, the government prosecutor has regained substantial influence over the grand jury and, consequently, that institution has lost much of its former independence." In re Russo, 53 F.R.D. at 569. Hence, it is not surprising that rationales now asserted by Florida to justify its Twentieth Century statute are not derived from the common law purpose of protecting grand jurors from prosecutorial pressure and abuse. Rather, Petitioners rely upon rationales

[7]Interestingly, some grand juries during those periods widely publicized their charges, activities, and reports as a form of "patriotic propaganda." See Beale & Bryson, supra, § 1:03 at 13; Younger, supra, at 17-19.

for witness secrecy that are premised upon perceived protection of the grand jury proceedings from the accused. Indeed, as noted in part I, above, permanent secrecy in the modern context may actually insulate the government from a reporter/witness' investigation of political corruption.

Nor has witness secrecy historically been treated as an essential or necessary element of the secrecy of grand jury proceedings and deliberations. Most states and federal districts did not require witness secrecy at the time the federal rules went into effect in 1946. See In re Russo, 53 F.R.D. at 570. Since that time, even more states have abandoned or narrowed rules requiring witness secrecy. See part III B.1 and Appendix.

In fact, witness silence was not considered an essential element of grand jury secrecy even in Florida until the 1951 and 1971 amendments to its grand jury statutes. The plethora of abstract interests now asserted by Petitioners appear nowhere in the language of § 905.27 or in the legislative history of its amendments. Even if these modern purposes could be regarded as the Florida Legislature's actual purposes, Petitioners fail to demonstrate how the permanent muzzling of witnesses, with all its attendant negative effects, is narrowly tailored to further those ends. See strict scrutiny cases cited in part

IIA, above.[8]

B. Florida's Interests in "Grand Jury Integrity" Can be Protected by Means That Are Less Restrictive of Witnesses' First Amendment Freedoms.

This Court has repeatedly insisted that a statute, to be considered "narrowly drawn," must target and eliminate "no more than the exact source of the 'evil' it seeks to remedy." Frisby v. Schultz, 108 S.Ct. 2495, 2502 (1988); City Council of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789, 808-10 (1984). A total ban can be considered narrowly tailored "only if each activity within the proscription's

[8]In fact, the statute does not satisfy even the more lenient Seattle Times standard preferred by Petitioners, as its permanent limitation upon First Amendment freedoms is "greater than is necessary or essential to the protection of the particular governmental interest involved." 467 U.S. at 32.

scope is an appropriately targeted evil." Frisby, 108 S.Ct. at 2502-03.

Florida seeks to protect the integrity of its grand jury system by keeping all proceedings eternally secret. Hence, the statute does much more than eliminate the exact source of the perceived evil. In fact, § 905.27 is not the least restrictive means of addressing either the general concerns about "grand jury integrity" or the specific interests now proffered by Petitioners.

1. There is No Proof That Future Investigations Will be Inhibited by Disclosure of Witness Testimony After a Grand Jury Has Completed Its Work.

The State baldly asserts that failure to forbid witness disclosure might "permit possible compromise of complex and ongoing criminal investigations." Brief for Petitioners

at 21. Instead of the "solidity of evidence" required by Landmark Communications, Pennekamp, and Bridges, Petitioners offer no evidence that this is a real, imminent danger. Indeed, actual experiences with less restrictive disclosure rules in the federal grand jury system and most states show the contrary.

Since the Federal Rules of Criminal Procedure went into effect in 1946, witnesses testifying before federal grand juries, including those empaneled in Florida, have been free to choose to disclose their testimony, even during an investigation. See Fed.R.Cr.P. Rule 6(e); Notes of Advisory Comm. on Rules, Note to Subdiv. (e), Note 2. See generally Brown, The Witness and Grand Jury Secrecy, 11 Am.J.Crim.L. 169, 175-81 (1983); Winters, A Study of Rules 6,

7, 8, and 9 of the Federal Rules of Criminal Procedure, 25 Or.L.Rev. 10, 15 (1945). This freedom to speak, which is much greater than that permitted under the Eleventh Circuit's ruling, has been challenged and upheld. See In re Investigation Before the April 1975 Grand Jury, 531 F.2d 600, 607 n.11 (D.C. Cir. 1976); In re Grand Jury Subpoena, 574 F.Supp. 85 (S.D.N.Y. 1983); In re Doe, 537 F.Supp. 1038 (D.R.I. 1982); In re Vescovo Special Grand Jury, 473 F.Supp. 1335 (C.D. Cal. 1979).

In addition to the federal grand jury system, fully 40 other American jurisdictions have promulgated statutes or rules which are less restrictive of witness speech than § 905.27.[9] All of

[9] See Appendix, listing relevant jurisdictions. See also note 12, infra, describing judicial limitations in several states.

these grand jury systems have a similar need for some degree of confidentiality; nothing unique to Florida's system, and certainly nothing in this record, demonstrates the need for a substantially broader rule of witness silence in that state. To the contrary, Florida's assertion that future investigations would be inhibited by any narrower rule is simply unsupportable given the federal experience and the experiences of the vast majority of other American states and territories. See Brief of State of Arizona at 4 (conceding that alleged impact on future grand jury proceedings "may be an unprovable fact in this case").

The federal government's experience is particularly instructive, as it uses many more grand juries and conducts more complex, ongoing investigations before

those grand juries than does the State of Florida or, indeed, any state in the nation. Not only do the federal rules permit witnesses to reveal their own grand jury testimony outside the grand jury room, but the highest level of federal officials have disclaimed any prosecutorial need for a broad general silencing of witnesses. See Grand Jury Reform, Hearings on H.R. 94, Before Subcommittee on Immigration, Citizenship, and International Law of House Committee on Judiciary, 95th Cong., 1st Sess. 729, 738 (1977) (statement by Asst. Att'y Gen. Civiletti, stressing importance of preserving free speech and press rights of witnesses, while reporting that 23,000 indictments and 132 no-true bills were issued by federal grand juries in 1976); see also Reports of Judicial

Conference, Reports of the Administrative Office, U.S. Courts 24-25, 406-07 (1988) (10,817 grand jury sessions, with average of 3.58 defendants indicted per session in 1988).

In fact, the Rule 6(e) "proscription upon the imposition of secrecy obligations on witnesses has remained intact for over 35 [now more than 40] years. During this period, no empirical evidence has suggested that this breach in grand jury secrecy has in any way interfered with the functioning of the grand jury." Brown, supra, at 181 (emphasis added). See also Smith v. Butterworth, 866 F.2d 1318, 1320 (11th Cir. 1989); In re Russo, 53 F.R.D. 564, 570 (C.D. Cal. 1971).

2. Section 905.27 Does Not Protect the Identity of Grand Jurors.

Petitioners' assertion that the severe strictures of § 905.27 are needed to prevent Smith from revealing the names of grand jurors need not detain this Court long. First, § 905.27 does not forbid a witness from revealing the names of grand jurors. Second, as the district court in this case noted, the press and other interested persons in Florida have access to the area just outside the grand juryroom. See Smith v. Butterworth, 678 F.Supp. 1552, 1557 (M.D. Fla. 1988). Therefore, the identity of Florida's grand jurors can be readily ascertained by other means. In short, this statute neither reflects nor accomplishes the interest in grand jury anonymity which Florida now asserts as one of its principal justifications.

See The Florida Star v. B.J.F., 109 S.Ct. 2603 (1989).[10]

3. There Are More Focused, Less Restrictive Means to Prevent Perjury, Witness Tampering, and the Flight of Grand Jury Targets.

Under the Eleventh Circuit's carefully crafted order, no witness is required to reveal his or her testimony publicly. If that order is affirmed, any Florida grand jury witness would still have the right to remain silent. The records of the grand jury would still be subject to the detailed secrecy requirements now in place, and the State could still authorize judges to order silence from witnesses when the need for their silence is shown by the actual record of particular cases.

[10]Moreover, nothing in the complaint (see Pet. App. at a-31) or in testimony reflects a plan by Smith to disclose the names of grand jurors.

Smith's objection, and the ACLU's objection, is to Florida's unusual prohibition, which, in all cases, forbids a witness to reveal the "content, gist or import" of his or her own testimony. The trend is clearly away from such blanket, permanent witness silence, even in the states that Florida considers kindred spirits. Of the 16 states described as similar on page 5 of Petitioners' Brief, four have abandoned Florida's absolutist position -- three by statute,[11], and one by

[11]See Conn. Gen. Stat. § 54-45a (1989) (making only the stenographer's record confidential); N.J. Court Rule 3:6-7 (1988) (requiring persons before the grand jury other than witnesses to take an oath of secrecy), N.J. Rev. Stat. § 2A:73B-3 (Supp. 1989) (disclosure unlawful only if made "with the intent to injure another"); W. Va. Rules Crim. Proc. Rule 6(e)(2) (1989) (adopting Federal Rule 6(e)(2) verbatim).

judicial interpretation.[12]

Moreover, Florida has other laws that specifically address the fears Petitioners express here. Tampering

[12] See Shelby v. Sixth Judicial District Court, 82 Nev. 204, 414 P.2d 942 (1966) (secrecy of grand jury proceedings not absolute; statute can be directed only to jurors, not to witnesses).

This decision follows the pattern of several other states, which allow disclosure after the grand jury has been discharged -- the very position taken in the Eleventh Circuit's order in this case. See, e.g., Ala. Code §§ 12-16-211 to -215 (1986); Colo. Crim. Proc. Rules 6.2, 6.3 (1981); N.D. Cent. Code § 29-10.1-30 (1989); S.D. Codified Laws Ann. § 23A-5-16 (1979 & Supp. 1987); Burkholder v. Alaska, 491 P.2d 754, 755 (Alaska 1971); United States v. Ben Grunstein & Sons Co., 137 F.Supp. 197 (D.N.J. 1955); People v. Gomez, 33 P.R. 179, 186 (1924); Rippy v. State, 550 S.W.2d 636, 642 (Tenn. 1977); State v. Faux, 9 Utah 350, 345 P.2d 186, 187 (1959); United States v. Badger Paper Mills, Inc., 243 F.Supp. 443 (D.Wis. 1965) See also Appendix (detailed listing of states with few restrictions upon witnesses).

with a witness or informant to "influence the testimony of any person in an official proceeding" is a felony under Fla. Stat. § 914.22 (1988). Retaliation against witnesses is a felony under § 914.23 (1988). Perjury and bribery are also unlawful. See Fla. Stat. §§ 837.011-837.060, 838.015-838.016, 838.021 (1988).

Nothing in the Eleventh Circuit's decision prevents Florida from enforcing these laws. Duplicative processes are unnecessary when other specific statutes fulfill the state's purpose by less restrictive means. See, e.g., Texas v. Johnson, 109 S.Ct. 2533, 2542 (1989); City of Houston v. Hill, 482 U.S. 451, 462 n.10 (1987); see also Boos v. Barry, 108 S.Ct. 1157, 1166-67 (1988).

Furthermore, the Eleventh Circuit carefully limited its decision to allow

witness disclosure only after the conclusion of the grand jury session. The court recognized that once the investigation has been concluded and indictments issued, the revelation by a witness of his own testimony would come too late for the defendant to flee. The evidence that the grand jury determined it needed would already have been gathered and considered. Moreover, if that were not true in a particular case, the State could authorize courts to issue specific, time-limited gag orders based upon a proper showing. As many jurisdictions have determined, once an indictment has issued, a witness' revelation of his own testimony does not impair the state's normal procedures in

any way. See footnote 12, supra.[13]

4. Preventing "Sensational" Reporting is a Baseless Concern and an Inappropriate State Interest.

Petitioners also assert that "sensational" reporting regarding grand jury proceedings may take place. This claim is totally without foundation on this Record. Furthermore, no such experiences in the federal system, other states, or Florida are even mentioned. Even if unpleasant reporting were a possible risk, this Court has repeatedly ruled that a state has no legitimate interest in suppressing writings about public institutions or matters of public concern, even if the writings are dramatic, disrespectful, vehement, or slanted. See, e.g., Hustler Magazine v.

[13]As the grand jury did not indict in the instant case, the asserted risk of flight obviously has no application here.

Falwell, 108 S.Ct. 876, 882 (1988); Landmark Communications, 435 U.S. 829, 840-42 (1978); New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964); Wood v. Georgia, 370 U.S. 375, 389 (1962). See generally Providence Journal Co. v. Newton, 723 F.Supp. 846, 1989 WL 125992 (D.R.I. 1989) (applying these and related cases in an analogous context).

C. Protection of Reputations Cannot Be Considered a Compelling Justification for This Statute.

Petitioners cite "[p]rotecting the identity of the innocent accused" as "one of the most compelling reasons for secrecy." Brief for Petitioners at 9. See also id. at 12, 14; Brief of State of Ariz. at 2. Even accepting that premise, however, the Florida statutes under attack cannot survive the strict scrutiny that is required by this Court's established precedents. First,

the overbreadth of the statute is illustrated by the facts of this case. The investigations conducted by Smith and by the grand jury involved possible corruption among public officials in Charlotte County.[14] Under these circumstances, the public's right to know is at its zenith and the reputational interest of the officials involved is correspondingly diminished. See Landmark Communications, 435 U.S. at 841; Gertz v. Robert Welch, Inc., 418 U.S. 323, 344-45 (1974); New York Times, 376 U.S. at 273. See also First Amendment Coalition v. Judicial Inquiry

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[14]Moreover, there was testimony suggesting that this was one of the most common uses of grand juries which are now only rarely employed in Florida. See Deposition of Assistant State Attorney Charles Warren Goodwin 14-16; Transcript 15-16 (testimony of Chief Assistant State Attorney W. Christian Hoyer).

& Review Bd., 784 F.2d 467, 476 (3d Cir. 1986) (en banc).

Second, the permanent silencing of a witness may prevent that witness from vindicating his or her own reputation. For example, a witness compelled to testify regarding minor matters, e.g., a particular bookkeeping method, may be stigmatized when it becomes known that he or she testified to the grand jury. Yet, § 905.27 prevents that witness from clearing his name by explaining that he had no role in the crime being investigated. The gag placed in his mouth by the statute prevents him from correcting any mistaken impression. Similarly, the statute prevents a target of an investigation who later is not indicted from clearing his name by telling his own story. This is a

curious means of "protecting" reputations.

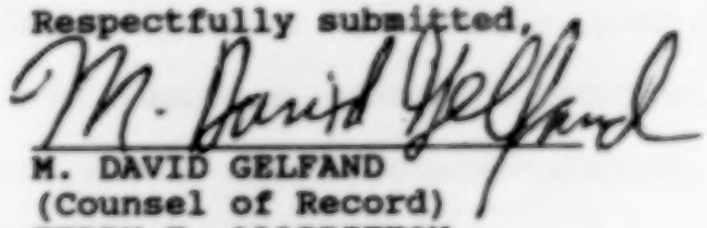
Finally, the permanent nature of this statutory muzzle means that a witness cannot discuss his or her testimony even years after the accused has been tried and convicted, unless the witness' testimony "is or has been disclosed in a court proceeding." Fla. Stat. § 905.27(2). Nor could a newspaper report it. Id. Respondents do not identify any reputational interest preserved under those circumstances, and none is readily apparent.

Therefore, Florida's permanent and complete ban on witnesses' disclosing their own testimony cannot stand. The Eleventh Circuit correctly excised the unconstitutional portion of the challenged statute.

CONCLUSION

For the foregoing reasons, the decision below should be affirmed.

Respectfully submitted,



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APPENDIX
LESS RESTRICTIVE STATUTES AND RULES

Fed. Rule Crim. Proc. 6(e)(2) and Advisory Comm. Note 2 (1989) (specifically allowing witness disclosure); Ala. Code §§ 12-16-211, -214, -215 (1986) (making witnesses liable for disclosure only before a defendant is indicted or arrested); Alaska Crim. R. 6(h) (1975) (following Federal Rule); American Samoa Code Ann. § 46.0501 (1981) (adopting federal rule); Ark. Stat. Ann. § 16-85-514 (1987) (no reference to witness secrecy); Cal. Penal Code §§ 924-924.2 (Deering 1971 & Supp. 1989) (no reference to witness secrecy); Colo. Rules Crim. Proc. 6.2, 6.3 (1981) (oath of witness secrecy continues "until a grand jury report is issued dealing with the investigation"); Conn. Gen. Stat. § 54-45a (1989) (no reference to witness

secrecy); Del. Code Ann. tit. 11, § 1273 (1987) (addressing only public servants with intent to disclose); D.C. Court Rules Ann. 6(e) (1989) (mirroring Federal Rule); Ga. Code Ann. § 15-12-68 (1985 & Supp. 1989) (no reference to witness secrecy); Guam Crim. Proc. Code § 50.34 (1977 & Supp. 1980) (no reference to witness secrecy); Haw. Rules Penal Proc. 6(e) (1977) (expressly relieving witnesses of secrecy obligations); Idaho Crim. Rules, Rule 6(e) (1987) (no reference to witness secrecy); Ill. Rev. Stat. ch. 38, para. 112-6 (Supp. 1989) (similar to Federal Rule); Iowa Code § 813.2, Rule 3(d) (1986 & Supp. 1989) (no reference to witness secrecy); Kan. Stat. Ann. § 22-3012 (1988) (expressly relieving witnesses); Me. Rev. Stat. Ann. tit. 15, § 1252 (1984) (not requiring witnesses

to take oath of secrecy); Md. Cts. & Jud. Proc. Code Ann. § 8-213 (1984) (no reference to witness secrecy); Mass. Rules Crim. Pro. 5(d) (1979 & Supp. 1989) (expressly relieving witnesses); Minn. Rules of Crim. Proc. 18.08 (1979 & Supp. 1989) (relying mostly upon Federal Rule); Mont. Code Ann. § 46-11-317 (1989) (expressly relieving witnesses); Neb. Rev. Stat. §§ 29-1404 to 29-1415 (1985) (no reference to witness secrecy); N.H. Rev. Stat. Ann. § 600:3 & :4 (1986) (no reference to witness secrecy); N.J. Rev. Stat. § 2A:73B-3 (Supp. 1989) (persons liable only if disclosure constitutes tortious conduct), N.J. Court Rule 3:6-7 (excluding witnesses from an oath of secrecy); N.M. Stat. Ann. § 31-6-6 (1978) (no reference to witness secrecy); N.Y. Penal Law § 215.70

(McKinney 1988 & Supp. 1989) (exempting witnesses from liability); N.D. Cent. Code § 29-10.1-30 (1989) (silencing witnesses "until an indictment is filed and the accused person is in custody"); Okla. Stat. tit. 21, §§ 582, 583 (1983) (no reference to witness secrecy); Or. Rev. Stat. §§ 132.100, 132.220 (1987) (no reference to witness secrecy); Pa. Rules Crim. Pro. Rules 256-257, 259 (1989) (no reference to witness secrecy); R.I. Rules Crim. Proc. 6(e) (1989) (similar to Federal Rule); S.D. Codified Laws Ann. § 23A-5-16 (1979 & Supp. 1987) (witnesses obligated only until accused is in custody); Tenn. Rules Crim. Proc. 6(a)(1) (1988) (no reference to witness secrecy); Vt. Rules Crim. Proc. 6(f) (1974) (based on Federal Rule); Va. Code Rule 3A:5(b) (1989) (stating that "[n]o obligation of

secrecy may be imposed upon any person"); V.I. Code Ann. tit. 5, sec. 6(e) (Supp. 1988) (adopting Federal Rule); W. Va. Rules Crim. Proc. 6(e)(2) (1989) (mirroring Federal Rule); Wis. Stat. § 756.20 (1981) (no reference to witness secrecy); Wyo. Stat. § 7-5-308 (1989) (expressly relieving witnesses). South Carolina has no statutory law which addresses grand jury secrecy.